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U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

PUBLIC COPY

[redacted]

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FILE: [redacted] Office: TEXAS SERVICE CENTER Date: AUG 29 2007

SRC 06 224 52837

IN RE: Petitioner:
Beneficiary: [redacted]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

for Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner seeks to classify the beneficiary pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability. The petitioner asserts that the beneficiary qualifies for Schedule A, Group II designation. The director did not contest that the beneficiary is eligible for classification as an alien of exceptional ability or a member of the professions holding an advanced degree. Rather, the director concluded that the petitioner had not demonstrated that the beneficiary qualifies for Schedule A, Group II designation.

On appeal, counsel asserted that specific conclusions by the director are in error but, beyond asserting that the director did not consider the beneficiary's citation record, provided no specific assertions of factual error and did not cite to any legal authorities that contradict the director's legal analysis. Counsel indicated that he would submit a brief and/or additional evidence to the AAO in 30 days. Counsel dated the appeal March 12, 2007. As of August 10, 2007, this office had received nothing further. Thus, on that date, this office contacted counsel by facsimile, inquiring as to whether a brief or additional evidence had been submitted and requesting copies of anything submitted to support the appeal. In response, counsel asserts that the statements on the Form I-290B, Notice of Appeal, constitute the complete appeal. Thus, we will review the record before the director and counsel's assertions as provided on the Form I-290B. For the reasons discussed below, we concur with the director that the beneficiary's publication record, including the frequent and widespread citation of his work, serves to meet one of the regulatory criteria, but that the petitioner has not provided sufficient evidence to establish that the beneficiary meets any of the other regulatory criteria.

Section 203(b) of the Act states in pertinent part that:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. --
>
> > (A) In General. -- Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.

The regulation at C.F.R. § 204.5(k)(4) provides the following information regarding labor certification and Schedule A designation:

> (i) *General.* Every petition under this classification must be accompanied by an individual labor certification from the Department of Labor, by an application for

> Schedule A designation (if applicable), or by documentation to establish that the alien qualifies for one of the shortage occupations in the Department of Labor's Labor Market Information Pilot Program. To apply for Schedule A designation or to establish that the alien's occupation is within the Labor Market Information Program, a fully executed uncertified Form ETA-750 in duplicate must accompany the petition. The job offer portion of the individual labor certification, Schedule A application, or Pilot Program application must demonstrate that the job requires a professional holding an advanced degree or the equivalent or an alien of exceptional ability.

The ETA Form 9089[1] indicates that a doctorate degree is required for the position. The beneficiary holds a Ph.D. in Biology-Health from the University of Montpellier II. The beneficiary's occupation falls within the pertinent regulatory definition of a profession. The beneficiary thus qualifies as a member of the professions holding an advanced degree and the position itself requires an advanced degree professional. The remaining issue is whether the petitioner has established that the beneficiary qualifies for Schedule A designation.

In order to establish eligibility for Schedule A designation, the petitioner must establish that the beneficiary qualifies as an alien with exceptional ability *as defined by the Department of Labor.* 20 C.F.R. § 656.15(d). This petition seeks to classify the beneficiary as an alien with exceptional ability in the sciences. 20 C.F.R. § 656.15(d)(1) provides, in pertinent part:

> An employer seeking labor certification on behalf of an alien to be employed as an alien of exceptional ability in the sciences or arts (excluding those in the performing arts) must file documentary evidence showing the *widespread acclaim and international recognition* accorded the alien by recognized experts in the alien's field; and documentation showing the alien's work in that field during the past year did, and the alien's intended work in the United States will, require exceptional ability.

(Emphasis added.) In addition, the same provision outlines seven criteria, at least two of which must be satisfied for an alien to establish the widespread acclaim and international recognition necessary to qualify as an alien of exceptional ability. Given the introductory language to the criteria emphasized above in 20 C.F.R. § 656.15(d)(1), the evidence submitted to meet these criteria should be indicative of or uniquely consistent with "widespread acclaim and international recognition" as a scientist of exceptional ability if that regulatory standard is to have any meaning. The petitioner has submitted evidence that is claimed to meet the following criteria.[2]

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[1] This form replaced the Form ETA 750 as of March 28, 2005. *Labor Certification for the Permanent Employment of Aliens in the United States; Implementation of New System*, 69 Fed. Reg. 77386 (Dec. 27, 2004).

[2] The petitioner does not claim that the beneficiary meets or submit evidence relating to the criteria not discussed in this decision.

Documentation of the alien's receipt of internationally recognized prizes or awards for excellence in the field for which certification is sought.

Throughout the proceeding, including on appeal, counsel has asserted that research grants from the National Institutes of Health (NIH) can serve to meet this criterion. The petitioner submitted evidence that Ambion, Inc., the beneficiary's prior employer, received NIH grants for projects on which the beneficiary was the principal investigator.

The director concluded:

> Every successful scientist engaged in research, of which there are hundreds of thousands, receives funding from somewhere. Obviously the past achievements of the principal investigator are a factor in grant proposals. The funding institution has to be assured that the investigator is capable of performing the proposed research. Nevertheless, a research grant is principally designed to fund future research, and not to honor or recognize past achievement.

On appeal, counsel asserts that the director erred in reaching this conclusion but provides no discussion of how these statements are factually, logically or legally wrong. The director's conclusion is clearly factually sound; the petitioner relies solely on the beneficiary's research grants designed to fund future research. Further, we find no flaw in the director's logic or reasoning; a research grant designed to fund future research is not designed to recognize past excellence. Finally, the director's interpretation of the plain language of the regulation as requiring awards or prizes designed to recognize past excellence is reasonable and we know of no legal authority presenting a contrary position. Thus, we concur with the director's conclusion and reasoning; research grants are not awards or prizes for excellence in the field.

Published material in professional publications about the alien, about the alien's work in the field for which certification is sought, which shall include the title, date, and author of such published material.

The petitioner has submitted evidence that the beneficiary is well cited. The director analyzed these citations and concluded that the petitioner had not demonstrated that the beneficiary had been cited "as authoritative." On appeal, counsel asserts that the director's analysis was in error.

Articles which cite the beneficiary's work are primarily about the author's own work, not the beneficiary or his work. As such, citing articles, which typically cite at least tens of articles, cannot be considered published material about the beneficiary or his work. We do not contest that the beneficiary's citation record is valuable evidence and will consider it below in evaluating whether the beneficiary's publication record is consistent with widespread acclaim and international recognition. Citations, however, cannot be credibly considered articles about the beneficiary or his work and, thus, cannot serve to meet the plain language of this criterion.

Evidence of the alien's participation on a panel, or individually, as a judge of the work of others in the same or in an allied field of specialization to that for which certification is sought.

Counsel has asserted throughout the proceeding, including on appeal, that the beneficiary's position as principal investigator for funded research projects serves to meet this criterion. The director concluded that the beneficiary's supervisory duties were inherent to his occupation and did not involve judging on a national or international scale. Once again, while counsel asserts that the director's conclusions are erroneous, counsel provides no discussion or legal analysis supporting his assertion.

It is significant that the regulation is not worded to require evidence that the alien has judged the work of others. Rather, the plain language of the regulation requires evidence of the alien's participation on a panel or individually as "a judge." The requirement that the alien have participated as "a judge" implies participation in an official judging position. A supervisor, while responsible for overseeing the work of his subordinates, is not participating as "a judge" of those subordinates. Moreover, the mere act of leading a research team is not indicative of or uniquely consistent with widespread acclaim and international recognition as a scientist of exceptional ability.

We concur with the director that the record lacks evidence that the beneficiary has participated as "a judge" of the work of others. Without evidence that the beneficiary has served in an official judging position indicative of widespread acclaim and international recognition as a scientist of exceptional ability, such as but not limited to, as a judge of work under consideration for a recognized award, on an editorial board or as a grant reviewer, we cannot conclude that the beneficiary meets this criterion.

Evidence of the alien's original scientific or scholarly research contributions of major significance in the field for which certification is sought.

According to the regulation at 20 C.F.R. § 656.15(d)(1)(v), an alien's contributions must be not only original but of major significance. We must presume that the phrase "major significance" is not superfluous and, thus, that it has some meaning. To be considered a contribution of major significance in the field of science, it can be expected that the results would have already been reproduced and confirmed by other experts and applied in their work. Otherwise, it is difficult to gauge the impact of the beneficiary's work.

Initially, counsel asserted that the patent application, reference letters and six citations submitted with the petition establish the beneficiary's eligibility under this criterion. Noting that the reference letters were from the beneficiary's immediate circle of colleagues and that some of the letters were dated several years prior to the filing date of the petition, the director requested new reference letters that "clearly indicate the impact the beneficiary's research has had on his field." In response, the petitioner submitted two new letters. One of the new letters focuses on the importance of the beneficiary's *area* of research and the other is from a former close colleague. On appeal, counsel asserts that the director erred in "dismissing letters of support describing original contributions of the

beneficiary because the letters were either written several years ago, not dated, or written by 'the beneficiary's supervisor,'" but does not elaborate further.

Regarding the patent application, this office has previously stated, in a precedent decision involving a lesser classification, that a patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole. *See Matter of New York State Dep't. of Transp.*, 22 I&N Dec. 215, 221 n. 7, (Comm. 1998). Rather, the significance of the innovation must be determined on a case-by-case basis. *Id.* Thus, a patent application cannot, by itself, serve as evidence of a contribution of major significance. The record does not indicate, for example, that there has been widespread interest in licensing the beneficiary's patent-pending innovation.

We acknowledge that the beneficiary has been widely cited. This evidence, as discussed below, reflects on the beneficiary's publication record and is a significant consideration in our conclusion that the beneficiary meets the scholarly articles criterion set forth at 20 C.F.R. § 656.15(d)(1)(vi), discussed below. Such evidence could also serve to support reference letters that address the beneficiary's contributions of major significance. For the reasons discussed below, however, we concur with the director that the reference letters in this matter are insufficient.

At the outset, we note that Citizenship and Immigration Services (CIS) may, in its discretion, use as advisory opinions statements submitted as expert testimony. *See Matter of Caron International*, 19 I&N Dec. 791, 795 (Commr. 1988). However, CIS is ultimately responsible for making the final determination regarding an alien's eligibility for the benefit sought. *Id.* The submission of letters from experts supporting the petition is not presumptive evidence of eligibility; CIS may evaluate the content of those letters as to whether they support the alien's eligibility. *See id.* at 795; *see also Matter of Soffici*, 22 I&N Dec. 158, 165 (Commr. 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Regl. Commr. 1972)).

In evaluating the reference letters, we note that letters containing general, poorly supported assertions of widespread acclaim, discussions of the importance of the *area* of the beneficiary's work or vague claims of contributions are less persuasive than letters that specifically support the beneficiary's purported widespread acclaim and international recognition as exceptional, such as by identifying contributions and providing specific examples of how those contributions have influenced the field. In addition, letters from independent references who were previously aware of the petitioner through his reputation and who have applied his work are the most persuasive as they are consistent with widespread acclaim and international recognition. Overall, the letters in the record do not provide information consistent with widespread acclaim and international recognition; for example, as discussed below in more detail, they do not provide specific examples of how the beneficiary's work is already being applied in the field and none of the letters are from independent references actually applying the beneficiary's work or who have been influenced by the beneficiary. In fact, the petitioner has not submitted any letters from independent experts in the field.

[redacted], the petitioner's Chief Executive Officer and founder, discusses his recruitment of the beneficiary to first Ambion, Inc. and then to the petitioner. [redacted] asserts that, prior to joining Ambion, the beneficiary had "extensive and impressive research experience of fundamental and applied RNA, studies on the regulation of the pre-mRNA splicing machinery, numerous scientific publications, and research of P-element transposase pre-mRNA splicing." At Ambion, the beneficiary "developed and launched a number of products related to miRNAs, including mirVana Pairs, mirVana miRNA Detection Kit, mirVana Probe Construction Kit, mirVana qRT-PCR Kit and mirVana microassays." The beneficiary also led the development of Ambion's *in vitro* transcription technology, using this technology in a series of contract research and manufacturing products with a large pharmaceutical company. While [redacted] asserts that the beneficiary's level of productivity was exceptional, he does not explain the significance of any of the beneficiary's products or discuss their success or use beyond Ambion other than to assert that the beneficiary also worked with a large pharmaceutical company. The record contains no confirmation of the beneficiary's work with a large pharmaceutical company from that company.

[redacted] Senior Director for Product Development at Ambion, provides similar information, also asserting that "several" of the beneficiary's products were "a strong commercial success for Ambion." [redacted] further asserts that the new system for synthesizing capped RNA he developed with the beneficiary is five times more efficient and that capped RNA "is being used in the manufacture of cancer vaccines by companies such as Wyeth." Thus, [redacted] concludes that the beneficiary's work has "important implications for human health." [redacted] does not assert that Wyeth or any other company has already adopted the beneficiary's system for synthesizing capped RNA or is considering doing so. The record contains no letters from researchers at Wyeth or other cancer vaccine manufacturers asserting that they have adopted the beneficiary's system for synthesizing capped RNA.

The petitioner also submitted evidence regarding his Ph.D. research. [redacted] the beneficiary's Ph.D. research advisor at the University of Montpellier II, asserts that the beneficiary's Ph.D. research produced significant and novel findings. While [redacted] notes that this work was published, he provides no examples of how this work has influenced the field through application in other laboratories. The petitioner also submitted a 1998 report on the beneficiary's thesis rating it as "exceptionelle." Finally, the petitioner submitted a 1999 letter from [redacted] Director of the Institut de Génétique Moléculaire de Montpellier, asserting that the beneficiary's thesis committee, of which [redacted] was a member, gave the beneficiary the highest grade. [redacted] characterizes the beneficiary as "a scientist with a strong potential" and predicts that the beneficiary "will" make a personal imprint on science.

On appeal, the petitioner submits two new letters, one from a former consultant for Ambion and current consultant for the petitioner, [redacted], and the other from a member of the department in which the beneficiary did his postdoctoral work at the University of California (UC), Berkeley, [redacted] discusses the importance of miRNA molecules and asserts that the beneficiary is good at gathering data on miRNAs, but fails to identify specific contributions and explain

how they have influenced the field. [redacted] asserts that at UC Berkeley the beneficiary "provided key insights into the mechanisms by which KH domain-containing proteins, such as the P-element Somatic Inhibitor protein and its human orthologues, regulate the processing of specific target transcripts and modulate underlying developmental programs in a tissue specific manner." Dr. [redacted] does not provide examples of how this work is being applied in the field.

The beneficiary's field, like most science, is research-driven, and there would be little point in publishing research that did not add to the general pool of knowledge in the field. All of the letters are from the beneficiary's immediate circle of colleagues. While such letters are useful in explaining the beneficiary's role on a specific project, they cannot, by themselves, establish that the beneficiary enjoys widespread and international recognition as a scientist of exceptional ability. While the record includes numerous attestations of the important of the *area* of the beneficiary's work, none of the references provide examples of how the beneficiary's work is already influencing the field other than a vague assertion that the beneficiary's products have been commercially successful. The letters provide no other *specific* information consistent with widespread acclaim and international recognition. While the evidence demonstrates that the beneficiary is a talented researcher with potential, it falls short of establishing that he had, at the time of filing, already made contributions of major significance consistent with widespread acclaim and international recognition as a scientist of exceptional ability. Thus, the petitioner has not established that the beneficiary meets this criterion.

> *Evidence of the alien's authorship of published scientific or scholarly articles in the field for which certification is sought, in international professional journals or professional journals with an international circulation.*

The record contains evidence that the beneficiary has authored several articles and is widely and frequently cited. Thus, we concur with the director's conclusion that the beneficiary meets this criterion.

The documentation submitted in support of a claim of Schedule A exceptional ability must clearly demonstrate that the alien has achieved widespread acclaim and international recognition. The petitioner has shown that the beneficiary is a talented medical researcher, who has won the respect of his collaborators, employers, and mentors. The record, however, stops short of documenting the beneficiary's widespread acclaim and international recognition for exceptional ability in the sciences. Therefore, the petitioner has not established that the beneficiary is qualified for the benefit sought.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden.

This denial is without prejudice to the filing of a new petition by a United States employer accompanied by a labor certification issued by the Department of Labor, appropriate supporting evidence and fee.

ORDER: The appeal is dismissed.